No. 10,190

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt, and FIDELITY AND DEPOSIT COMPANY of MARYLAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

APPELLANTS' REPLY BRIEF

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Subject Index

Authorities

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APPELLANTS' REPLY BRIEF

I.

PRELIMINARY.

We address this answer to "appellees' reply brief on the merits", pages 11-77, inclusive, disregarding for the present the motion coupled therewith for a dismissal of certain of the appeals consolidated herein.

In preparing our reply it has seemed to us best to follow along the order of appellees' presentation except for seven preliminary points or observations separately listed below.

1. Burden of Proof.

We are not a little astounded by the position taken by appellees that we must sustain the burden of establishing the insufficiency of the lookout on board the Olympic II and the sufficiency of the lookout on the Sakito Maru. This, however, appears to be their theory, for they say:

> "Counsel make little or no attempt to defend the Sakito's incompetent lookout, saying merely that the finding must fall if visibility is determined to be approximately 200 meters. * * *
>
> " 'Every doubt as to the performance of the duty (lookout) and the effect of non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.'
>
> *The Ariadne,* 13 Wall. 475; 20 L. Ed. 542.
>
> "The Sakito, we submit, did not even begin to sustain the burden." (Appellees' Brief, page 41)

And on page 62 of their brief, referring to their own lookout, they say:

> "The burden of proof was and is on the Sakito to show that Ohiser (Olympic lookout) was not a competent lookout and did not exercise the diligence the situation required. She must show, therefore, that he lacked attentive watchfulness.
>
> *The Catalina,* (C.C.A. 9) 95 Fed. (2d), 283, 285."

We submit that these statements of the "law" set forth in the same brief are irreconcilable and evidence only the action of a mind eager to sustain a judgment at all events.

2. Beaufort Scale.

The force of the wind has a direct bearing on the dead-reckoning position which appellees' counsel fix for the Sakito Maru at 7:00 A.M. That force was force 1, Beaufort Scale, or a velocity of 7 knots. Counsel state:

> "The Olympic was anchored on a calm sea, with a wind hardly capable of filling a small boat's sail. (We wonder where counsel got the Beaufort Scale which shows force 1 as approximately 7 knots per hour. (Br. p. 5).)" (Appellees' Brief, page 59)

We got this scale rating from page 13 of the same source from which appellees secured their definition of "barge" (Appellees' Brief, App. p. 13), to wit, from Captain Bradford's "Glossary of Sea Terms".

And on page 37 of their brief, appellees' counsel state:

> "It is said that the Sakito was proceeding into a head wind, force 1, and the tide was affecting her. Force 1, according to the Beaufort Scale, is from 1 to 3 miles per hour, and is not sufficient to move a wind vane. * * * (Knight, Modern Seamanship, 10th Ed., p. 673.)"

As we understand the table in Knight's work, such table does not express the velocity of the wind. It deals with the velocity of vessels. A force 1 wind is such a wind as will move a fishing smack at about 2 knots per hour. The velocity of the wind is an altogether different thing, and the Beaufort Scale itself undertakes no correlation of wind forces to anything other than to the movement of vessels. In the absence of anything establishing its inaccuracy, we are accepting Captain Bradford's approximation as substantially accurate correlations of wind velocity to the movement of sailing vessels, which is shown by Beaufort's Scale.

We repeat that this variable which was *against* the Sakito making good her full run between 5:58 and 7:03 A.M. and the

factor of tide which was also *against* her making her full dead-reckoning run, are prime factors which upset all of appellees' nice calculations. These factors both operating against her certainly could not as well have had possibly an accelerating effect, as counsel intimate. We have never seen a case where "nice calculations" were so urgently pressed to fix a vessel's position in which the time and variables were so great. See

The Cape Franklin (1929) 39 F. (2d) 971, 972 (E.D. N.Y.);
The John Craig (1895) 66 F. 596, 598 (D.C. N.Y.);
The Newport (1888) 36 F. 910 C.C. N.Y.).

3. The evidence—witnesses.

In determining whether the rule of

The Ernest H. Meyer (1937) 84 F. (2d) 496 (C.C.A. 9)

should apply to its review of the trial court's findings, we respectfully request this Court to refer again to the eleven lines of our opening brief (pages 9 and 10) stating what witnesses testified in Court, what witnesses testified by deposition, and what witnesses by "statement". When counsel for appellees assert:

> "A few minor witnesses from the Sakito's deck watch were unavailable at the trial, * * *" (Br. p. 17)

such statement cannot be challenged except as a half-truth. Only Captain Sato of the Sakito Maru was present and testified at the trial. All minor and major witnesses from the engine room watch and deck watch except Captain Sato were unavailable at the trial.

4. What Olympic's witness Stiles saw.

Referring to when Olympic's witness Stiles saw the Sakito Maru at a time when she was only 100 to 150 yards away, counsel state the Sakito "had evidently made her turn, as he

could only see the bow, not the whole side". That is not the testimony in this record, and we quote:

> "Mr. Cluff: (Referring to when Stiles saw the Sakito) You could see the whole of the starboard side? A. Yes." (Ap. II, p. 717)

In other words, the Sakito Maru, according to this statement of this witness, must have turned in about half her own length to come stem on at a near right angle into the side of the Olympic II.

5. Ohiser's and Johnson's testimony irreconcilable—Jones' testimony.

Effort is made throughout appellees' brief to bulwark Ohiser's testimony by an asserted showing that it is the same as Johnson's. Counsel state that apparently Ohiser and Johnson saw the Sakito at about the same time. (Br. pp. 22, 61) That is not the record before this Court. Johnson happened to look up and see the Sakito, and responding to an inquiry of appellees' proctor as to whether he could give "an idea of how far away it seemed", stated:

> "A. Yes. Since I spoke *and thought of it a lot,* I am sure it was over a half a mile, probably three-quarters of a mile away." (Ap. II, p. 554)

As we pointed out in our opening brief (p. 12) with appproppriate record references (Ap. II, p. 687), Ohiser said he saw the Sakito Maru ten to twenty minutes before the collision. Let us correlate these estimates of time and distance to the Sakito's speed.

First we shall take Ohiser's minimum estimate of time, ten minutes, and Johnson's maximum estimate of distance, three-quarters of a mile. This will bring them as close together as the record permits. We shall also take the Sakito's own record as to her speed as that will further assist in "establishing" our

adversaries' point that Ohiser and Johnson saw the vessel "at about the same time." The figures are as follows:

Time Intervals	*Sakito Speed*	*Elapsed Time*	*Distance**
7:00½-7:03	16K.	2½ min.	4,000 feet
7:03 -7:06	11K. (Av.)	3 min.	3,300 feet
7:06 -7:09	6K.	3 min.	1,800 feet
7:09 -7:10½	3K. (Av.)	1½ min.	450 feet
		10 min.	9,550 feet

*Figured on a rough basis of 1 knot 6000 feet to aid Ohiser.

On this record Ohiser saw the Sakito about two miles away and Johnson ¾ of a mile away. Apparently they did not see her at about the same time.

But let us give the Sakito the best of it and assume the maximum time for Ohiser and the minimum distance for Johnson; i. e., 20 minutes and ½ mile. This will add 16,000 feet to the distance away at which Ohiser saw the Sakito headed west on a parallel course, or a total distance of 25,550 feet—nearly five miles for Ohiser, as against one-half mile for Johnson. Should we go further and assume the speed which Olympic's sailor-witness Grothe's testimony attributed to the Sakito just prior to the collision (Ap. I, p. 473), Ohiser saw the Sakito nearly eight miles away, which is very good "seeing" for such a dull and foggy morning and is about 16 times as far away as Johnson saw her.

The testimony that Jones thinks he would have seen the Sakito earlier if he had looked (Br. p. 24) stressed by appellees is hardly consistent with his testimony that he heard the Sakito's whistle just before she "loomed up out of the fog". (Ap. II, p. 482)

Witnesses not mentioned above were dealt with in detail in our opening brief, and we repeat there is no credible evidence in the record which justifies a finding that visibility was at least 1800 feet. The assumed disinterested character of most

of appellees' witnesses does not improve the quality of their testimony as proof of any fact when it is demonstrably a hodge-podge of impossibilities. We may assume that appellees called their best witnesses, and, had they called any more, their record would be even more erratic.

6. Collins' testimony—the distances between Olympic—Point Loma and Rainbow.

The statement is made that we endeavor to discredit our witness Collins. (Br. p. 26) We do no such thing. We simply point out that in the light of the best evidence of the distances between the vessels Olympic and Point Loma on the morning of the collision, his estimates are subject to a 50% error. We do not think Reeder's location of the three barges fixed by observations taken aboard his vessel while alongside each of them in April and May, 1940, four months before this collision, can be accepted as proving that the positions of the barges were the same on the day of the collision. (Br. p. 13) In asserting this we do not take the technical position that such determinations were remote in point of time. Our points are:

(a) The barges were continually having trouble with their anchors and this is clearly indicative of changes in position. (Ap. III, p. 1070)

(b) Lieutenant Hewins of the Coast Guard was continually patrolling these waters at a time close to the collision. He fixed their positions from recollection and from observations taken over the wreck of the Olympic. (Ap. III, pp. 985-987) Captain Andersen, Hermosa's president and in charge of the Olympic's operations, also gave testimony on this point and his estimates of distance with respect to the Rainbow are much closer to Hewins' than to Reeder's. He placed the Rainbow 880 yards off the Olympic's starboard quarter (Hewins 586 yards) (Reeder 1800 yards). Captain Andersen places the

Point Loma a little farther away than Reeder did and more than twice as far as Hewins but he was not there the morning of the collision. (Ap. I, pp. 356-357)

(c) No witness confirms Collins' testimony that the Sakito Maru gave the Olympic a broadside push of 200 *yards*. The entire record discloses a push of not exceeding 200 *feet*.

7. The Olympic's bell—audibility.

Counsel spend considerable space advising the Court of the audibility of the Olympic's bell. We did not attack its audibility. We asserted:

(a) Proof that it was regularly sounded at the critical periods is very weak;

(b) It was not the proper signal under Article 9(i), (33 U.S.C.A. Sec. 79(i));

(c) Good seamanship in the situation of the Olympic required greater precautions than a usual anchor bell.

When counsel inform the Court that on the morning of the collision Olympic's bell "was heard by almost everyone within a radius of a mile, except the officers and lookout of the Sakito" (Br. p. 28), they misstate the record. No one even as far away as ½ a mile testified to hearing the bell. The statement that it was heard on the Rainbow finds no support in the evidence. It is a gratuitous assumption.

II.

GENERAL REPLY.

Ohiser on ringing the bell.

Appellees state we confused Ohiser on cross-examination (Br. p. 30). The portion of Ohiser's testimony which we quoted on page 44 of our brief was given in response to questions

of the court. He said he thought he stopped ringing the bell at regular intervals after he sighted the Sakito. We make no assumptions in this regard. It is the man's testimony in this case. (Ap. II, p. 688) It is one of the facts proved by the Olympic's own evidence and in view of the general and vague testimony of other witnesses on the point, it is a critical fact. Reading Ohiser's entire testimony, he appears to us a literate, competent witness and one who spoke with assurance. He was unstable on visibility, probably because in his inexperience he never thought of it as anything important, and uncertain about sounding the bell because he was trying to be truthful. Certainly it hurt appellees that Ohiser remembered Greenwood came over toward the end to help him ring the bell. (Ap. II, p. 704) But we see no reason why his testimony on these two points should have been disregarded by the trial court or should be disregarded here simply because we cannot corroborate it. (Appellees' Brief, p. 31)

The Presumption of Fault against the Sakito.

(Appellees' Brief, pp. 19, 20 and 31)

In opening their argument, counsel for appellees rely upon the presumption of fault arising where a moving vessel runs into a stationary object. Their own quotation from

> *United States v. King Coal Co.* (1925) 5 F. (2d) 780, 783 (C.C.A. 9)

shows that this presumption is not a universal one, but is one to be applied in circumstances which do not exist in this case. A preliminary burden of proper anchorage or mooring, proper signals, proper lookout and observance of such other precautions for safety as the dictates of prudent seamanship requires, is a condition of any presumption. Absent such proof, there can be no presumption, for it is a dependent and not an independent one.

The Sakito Maru's Speed.

(Appellees' Brief, pp. 31-38)

Counsels' suggestion that a navigator must at all times know his exact visibility appears to us to be absurd. (Br. pp. 33, 34) Such perfection could only be achieved in any case by stopping the ship and sending out a small boat to the point where she just disappeared. Then by the time the vessel got under way again, conditions might have changed. Likewise, the small boat might be less or more visible than the vessels the ship's navigator might meet, upsetting all calculations. If such procedure had to be followed every time visibility was under two miles, there would be little commerce by sea.

We do not question the soundness of the decision of Mr. Justice Holmes in *The Germanic* (1905), 196 U.S. 589, 25 S. Ct. 317, which is simply and directly to the point that an expert can be found negligent. Every verdict in a malpractice case proves that. What we do contend is that the existence of such negligence is in any case a question of fact and not one which is proved by the establishment of an error.

Same—Captain Arthur's Testimony.

(Appellees' Brief, p. 34)

The brief in support of appellees refers to Captain Arthur's testimony "(A. III, pp. 1234-5)". The page reference is incorrect, but the portion quoted is from Ap. III, pp. 1324-5. The real vice in quoting that testimony is that it fails to quote the hypothetical question which preceded it. Such question assumed nothing concerning the character, reversing power, burden or maneuverability of the particular vessel involved in this case—to wit, the Sakito Maru. If further assumes what Captain Sato and Chief Officer Yokota did not know—the precise range of visibility. The testimony is for such reasons valueless for any purpose in this case.

Same—The Sakito's Navigation Chart Record.

Counsel say that the trial court refused to take the evidence of various witnesses who estimated the Sakito's speed at 9-12 miles per hour (giving us no record references) "but preferred to take the evidence of the Sakito's own navigation and engine room records, which indicated that at 7:09 the Sakito was moving at approximately 12 miles per hour".

In our opening brief, p. 63, n. 13, we demonstrated how impossible it would be to fix with any degree of accuracy the position of the Sakito Maru at 7:00, 7:03, 7:06, or 7:09 upon the basis of a 5:58 A. M. fix without precise information as to the wind and tide and their effects upon the particular vessel. We know that both retarded the Sakito and counsel and the trial court undertake arbitrarily to speculate upon the exact extent of such retardation. That is counsel's case for a speed exceeding 6 to 6½ knots at 7:09. It is rank speculation.

Same—The Record of Sakito's Revolution Counters.

(Appellees' Brief, pp. 36-37)

Appellees' counsel are correct in stating that we do not dispute that the revolution counters of the Sakito Maru between 7:03 and 7:09 show she turned a total of 501 revolutions. That is an average of 83.5 per minute. What we do dispute is that the conclusion can be drawn therefrom that the Sakito Maru's propellers were turning 83.5 revolutions per minute at the end of this period instead of 50 as testified to by her officers. The figure 83.5 represents an average between the full ahead revolutions of 118 at 7:03 and the slow ahead revolutions of 50 at 7:09.

During the first part of the period between 7:03 and 7:09, the Sakito Maru was decelerating from 118 revolutions and during such time her inertia was driving her through the water

at a rate faster than her engines were turning. The effect of passage through the water at such speeds (until full deceleration was accomplished) was to drive the propellers or cause them to revolve in a ratio proportioned to her speed through the water. No actual propelling force would be achieved until the way of the vessel through the water synchronized with the revolutions of her engines. These figures *disprove* and do not tend to *prove* a greater speed than 6-6½ knots at 7:09.

Sakito's Lookout.

Counsel complain that the trial court failed to find that the Sakito did not have a lookout at all, saying:

> "Half a dozen witnesses had a clear view of the Sakito's bows as she approached the Olympic, *of which several were experienced seamen* who knew where a lookout should be posted and were consciously looking for him." (Br. p. 39)*

The half dozen witnesses referred to include *only one man* who testified that he had had any experience on sea-going vessels. That was Grothe, who had eight years before been an A.B. seaman for about two years. (Ap. III, p. 414)

The Sakito's change of course.

Counsel state at page 40 that the time when the Sakito saw the Olympic is fixed "by the start of her admitted swing to starboard". No substantial swing to starboard between the time of sighting the Olympic and the collision has ever been admitted. A change of helm is admitted 1½ minutes prior to the collision, but the evidence is undisputed that the Sakito would, through inertia, follow her old course approximately 200 meters before answering her helm. Her heading might change quickly, but her course would not.

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*Emphasis ours throughout unless otherwise noted.

The Angle of Collision.

(Appellees' Brief, pp. 41-2)

On this point appellees rely upon the reconstructed picture of the collision prepared by Mr. Alderson, who they say measured "the angle of impact". (Ap. III, p. 1385) This diagram, it will be noted, lays out the hull of the Olympic exactly as if she were a rectangular box car. If the point of penetration were proven (and Olympic did not produce her diver), it is possible an intelligible drawing could be produced rather than one which simply suited the assumed necessities of Olympic's case. In the molded side of a vessel, penetration to a greater degree on the starboard than on the port bow proves nothing. And even if the exact point of impact were shown, it is entirely possible that the structural strength of, or location of compartments in the vessel collided with might be such as to cause resistance to penetration and consequent scarring to be greater on one bow than on the other.

We stated in our opening brief that, subject to influence of tide and wind, the Olympic was headed 270° true. Counsel, in supporting their acute-angle-collision theory, state she was headed west "magnetic" or 285° true. Let us look at the record. The witness is Captain Andersen, a licensed master and the president of Hermosa.

> "Q. Now what was the direction of the axis of the Olympic or her heading as she lay anchored there to Horseshoe Kelp after May 9th. Can you give that to us *in true degrees?*
>
> A. I don't know what you—what you say?
>
> Q. I am trying to ascertain the direction of the heading of the Olympic as she lay at anchor after May 9th.
>
> A. She was heading west, approximately, all the time.
>
> Q. Was that due west?
>
> A. Yes." (Ap. I, p. 380)

The statement that Captain Sato did not know the heading of the Olympic at the time he ordered the hard astarboard

(Br. pp. 42, 43) appears to be an inadvertence of counsel in the light of the record references. (Ap. III, pp. 1227, 1228, 1237) He knew her heading but could not determine her exact position until a few seconds later. The second reference deals with Captain Sato's recollection of the heading of a small boat, not the Olympic.

The experience and qualifications of the Sakito crew entitled their testimony to greater weight.

The authorities sanction a comparison of the experience and qualification of witnesses in collision cases.

> *The Vulcan* (1899) 96 F. 859, aff'd 106 F. 989 (C.C.A. 2), Cert. den. 183 U.S. 700, 22 S. Ct. 936, 46 L. Ed. 396;
> *The Henry O. Barrett* (1908) 161 F. 481 (C.C.A. 3).

In the District Court opinion in the first above cited case, Judge Coxe said:

> "In arriving at a correct answer to this question, the court should take into consideration the probabilities and presumptions based upon the skill, knowledge and ability of the crews of the respective vessels. Which of the two would be most likely to make a mistake." (96 F. 860, 861)

The trial court clearly overlooked this rule and counsel seem to assume that there is no such rule. (Br. p. 43) The truth is that there were no competent, qualified navigators who observed this collision except those on the Sakito Maru. Such fact justifies this Court in scrutinizing her testimony most carefully but does not justify the giving of equal weight to the testimony of inexperienced and unqualified observers.

The Olympic's Place of Anchorage.

(Appellees' Brief pp. 44-55)

This subject was fully covered in our opening brief, and need not detain us here except for correction of counsels' statement that the defense area shown on certain charts in evidence

was effective "some time in 1941". The defense area of forbidden anchorage shown on the exhibit Ap. III, p. 1056, was proclaimed by Executive Order No. 8403 signed by the President on May 7, 1940, almost four months before this collision. This collision occurred very close to that defense area, and if the Point Loma was as much inshore of the Olympic; i.e., two-tenths of a mile, as the Olympic claims, she was nearly right on the line. We print the text of the executive order in the appendix.

We are unable to locate the testimony of Captain Arthur referred to on page 45 of appellees' brief. Certainly the record reference "Ap. III, pp. 1336-8" is not accurate. (Br. p. 45). The statement that the area is that in which vessels drop and pick up pilots is not in accordance with the evidence in this case. The area is about two miles from where pilots are generally picked up and dropped. (Br. p. 45) (Ap. II, pp. 635-6)

Whether a vessel following the ten-fathom curve in a fog would pass one mile or five to the east of the barges would depend entirely upon where the vessel encountered fog and determined to take such course. Any such vessel might even have passed the fishing ground before encountering fog. (Br. pp. 45, 46)

The Olympic's Signals.

With respect to section (i) of Article 9 of the International Rules, we assigned as error the failure of the District Court to find that the Olympic II did not blow proper fog signals. (Ap. I, p. 252, Ass. of Err. XII) Failure to sound proper signals by the Olympic II was also pleaded by appellants. (Ap. I, p. 27, par. C) In the circumstances, the rule of

Anderson v. Alaska S.S. Co. (1927) 22 F. (2d) 532, 536 (C.C.A. 9); and

The Golden Gate (1931) 52 F. (2d) 397, 399 (C.C.A. 9),

can have no possible application.

We do not know of any rule or theory of the case that prevents this Court from deciding this question of law. It was brought out in the testimony of the president of Hermosa that they had a manually operated fog horn in operating order aboard the Olympic II which they did not use after the barge was tied up for the season at Horseshoe Kelp. (Ap. I, p. 376)

As remarked in the Second Circuit case, our brief page 23, relating to a moored vessel (assuming the fish-boat-signal statute or the anchored-vessel statute is not here applicable), it is a situation for judge-made law. Whether such judge-made law will take form to apply Article 9(i), Article 15(d), or require such a moored vessel to employ a scout tug or tugs to warn other vessels in foggy weather, is for the court to decide and not for counsel. (Appellees' Br. pp. 55-58) In any event, the Olympic II does not bring herself within Article 9(h) because that Article has application only when a fishing vessel becomes stationary "in consequence of her gear getting fast to a rock or other obstruction". (33 U.S.C.A. Sec. 79)

The General Unpreparedness of the Olympic.

Counsel complain that we suggest the general unpreparedness of the Olympic to take steps to protect herself was a grave fault. Other courts in similar situations have found fault with an anchored vessel for failure to take steps in avoidance of collision. Captain Andersen testified that it was Greenwood's duty to look "after the engines". (Ap. I, p. 387) If the Olympic could have hauled herself as much as 140 feet by moving up on her bow anchor during the period when the Sakito Maru was approaching her under full reversing power, stem on, 664 feet away, collision would have been avoided entirely. Power of self-propulsion was not necessary. This fault clearly goes to the competence of her personnel to deal with emergencies which might be anticipated and is within assignment of errors X and XIII. (Ap. I, p. 252) If the Olympic was equipped to take such

steps as good seamanship required, there is nothing in the record to show it.

Failure of Olympic to have 65% of deck crew able-bodied seamen.

Counsel state that it was the Sakito's burden to establish this negative. But the Olympic pleaded (Ap. I, p. 7):

> "The libelant used due diligence to make the said vessel seaworthy and, until the said collision, she was at all times tight, staunch and strong, sufficiently *manned,* equipped and supplied, and in all respects seaworthy and fit for the service in which she was engaged."

We invite the Court to contrast this allegation with the evidence of Captain Andersen as to the Olympic's crew. (Ap. I, pp. 386, 387) In the face of this record, we know of no presumption that a man is an able-bodied seaman simply because he works aboard a vessel. This is not a criminal prosecution, but a civil case where legitimate inferences can be drawn from facts proved in the light of stultifying pleadings of the adverse party.

Next Olympic advances the theory that a vessel complies with the LaFollette Act if she departs from port with a proper crew and then as soon as she has made such departure sends them all back with the pilot and continues on her way with incompetents. Yet we are accused of taking narrow and technical positions.

Background.

Practically all of the material covered by pages 65-69 is "off the record" matter which should not influence this Court's determination. There is no showing that anyone in the Bureau of Navigation had authority to waive inspection laws for the benefit of particular vessels or cases. If they did, or any of them did, it was at most a toleration inimical to the statutes

and hence had no legal sanction. A toleration extended by functionaries of government cannot modify an express law.

> *United States v. The Forrester* (1856) Fed. Cas. No. 15,132 (D.C. Mich.).

The Olympic had no certificate of inspection in force at the time of the collision.

The decision in

> *United States v. Monstad* (S.D. Cal.) 1942 A.M.C. 273,

was not, as appellees state, a holding that "the *barges* were * * * 'not navigated' within the meaning of Section 398, while lying at anchor and serving their patrons as fishing platforms" (Br. pp. 67, 68). It was a holding that one particular barge, the Kohala, anchored for over *four* years in the same locality approximately *one mile* off-shore, was not being navigated when the record indicated no intention immediate or prospective to move her. That was not the situation of the Olympic, even if we assume such decision to be sound.

In the case of

> *The Princess Sophia* (1932) 61 F. (2d) 339, 347 (C.C.A. 9),

appellees quote one sentence on page 73 of their brief. To complete the Court's thought, we quote the sentence following:

> "The rule simply is that the violator (of a statute) is penalized with the burden of showing that the violation not only *probably* did not cause the accident, but that it *could* not have done so." (Emphasis by the Court)

Last Clear Chance.

This Court did not, as counsel state (Br. p. 75), apply the doctrine of last clear chance in

> *Crowley L. & T. Co. v. Wilmington T. Co.* (1941) 117 F. (2d) 651 (C.C.A. 9).

The fact is that in that case the Patrick was held not in fault

at all. Accordingly the last-clear-chance doctrine could have no application. It is a doctrine which tempers the rigors of the doctrine of contributory negligence.

The weight of authority as shown in

45 *Corpus Juris,* p. 990,

is far in favor of application of the doctrine only when the plaintiff's peril is known to the defendant. A dozen or more federal cases are there cited in application of this theory of the rule and none in support of the application contended for by appellees' counsel here. It is true that the entire doctrine is generally considered to stem from

Davies v. Mann, 10 M & W 546, 12 L.J. Ex. 10, 6 Jur. 954,

but whether the defendant in that case saw the plaintiff's donkey is a question which, in the obscurity of the decision, never has and never will be settled.

Bulkheading — Sea-going barges — American Bureau of Shipping Standards.

The appendix to appellees' brief (apart from being replete with off-the-record matters) should demonstrate to the Court's satisfaction that the Olympic II was a sea-going barge and that it was the intention of Congress to regulate her as such irrespective of classic definition. (Appendix to Appellees' Br. pp. 3, 4, and 5) The trial court's decision completely overlooks these matters and the doctrine of elasticity of words. (Ap. I, pp. 133-135)

Massachusetts P. Ass'n. v. Bayersdorfer (1939) 105 F. (2d) 595, 597 (C.C.A. 6)

"Words, after all, are but labels whose content and meaning are continually shifting with the times. Towne v. Eisner, 245 U.S. 418, 425, 38 S. Ct. 158, 62 L. Ed. 372, L.R.A. 1918D, 254."

Adopting the practice of appellees' counsel and in endeavor to acquaint the Court with the American Bureau standards as relate to the Olympic's bulkheading, we quote in a second appendix a certain section of our reply brief in the trial court. This material, we think, answers the contentions of appellees' brief, page 71.

CONCLUSION.

Reviewing appellees' brief in its entirety, we see no occasion to depart from or to re-state the conclusions stated at page 71 of our opening brief.

January 7, 1943.

Respectfully submitted,

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(APPENDICES FOLLOW.)

Appendix I

EXECUTIVE ORDER No. 8403

May 7, 1940

ESTABLISHING LOS ANGELES - LONG BEACH HARBOR NAVAL DEFENSIVE SEA AREA

California

By virtue of and pursuant to the authority vested in me by the provisions of section 44 of the Criminal Code, as amended (U.S.C., title 18, sec. 96), all that area of water seaward of the mean low-water line in the Pacific Ocean easterly of a line bearing 147 degrees true from Point Fermin, California, and northerly of a line parallel to and 6,000 yards distant from the axis of the Los Angeles-Long Beach detached breakwater, extending eastward to Sunset Beach, California, except Los Angeles Harbor, Long Beach Inner and Outer Harbors, and all anchorage areas defined and established by the Secretary of War, is hereby established as a naval defensive sea area for purposes of national defense such area to be known as the Los Angeles-Long Beach Harbor Naval Defensive Sea Area.

At no time shall any vessel or other craft (other than public vessels of the United States and of the State of California, and merchant vessels and small craft during a fog or an emergency as hereinafter provided) be anchored within the defensive sea area above defined unless authorized by the Secretary of the Navy.

Merchant vessels and small craft may anchor in the defensive sea area during a thick fog or in an emergency of such nature as to require anchoring therein to prevent serious damage. Such merchant vessels and small craft shall leave the area on or before the passing of the fog or emergency: *Provided, however,* that, in the discretion of the Secretary of the

Navy, any such merchant vessels or small craft may be required to leave or to be towed out, immediately or at any time, without expense to the United States.

Any person violating the provisions of this order shall be subject to the penalties provided by law.

FRANKLIN D. ROOSEVELT

The White House,
May 7, 1940.

Appendix II

STATUTORY VIOLATIONS.

In our Opening Brief (pp. 42-43) we have pointed out the requirements of the inspection statutes applicable to seagoing barges (46 U.S.C. 395) and "all other vessels and barges of over 100 tons burden carrying passengers for hire" (46 U.S.C. 391). We have emphasized ("Sakito's" Opening Brief, pp. 43-44) that these statutes require the local inspectors to "satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation with safety to life".

It was in the exercise of the discretion thus reposed in the local inspectors that they reached the conclusion that the "Olympic II", to be safe and suitable to be used by the numbers of pleasure fishermen who would frequent her, should meet the requirements outlined in the specifications accompanying their letter to Captain Andersen. Counsel for Hermosa have disregarded these statutes and this repose of discretion in the local inspectors entirely in their opening brief and have based their attack upon the proposition that these requirements were not of the stature of regulations promulgated by the Bureau of Marine Inspection and Navigation under 46 U.S.C. 375.

This disregard of Sections 391 and 395 is made more pointed by the length to which counsel stretch their argument based on Section 375, and the general rules promulgated thereunder. Counsel's description of the seagoing barge statutes (Hermosa's Opening Brief, p. 49, lines 4-9), moreover, is not a fair statement of the inspection requirements, for it fails to state the very words giving sanction and force to the action of the local inspectors.

After maintaining up to this point that the "Olympic" was a fishing barge, counsel now assert that she was seaworthy because she met the statutory bulkhead requirements for sailing vessels and because there were no statutory requirements specifically detailing the bulkheads necessary in a barge. Again, this overlooks entirely the discretion wisely reposed in the local inspectors in every inspection district to *satisfy themselves* that a barge is "of a structure suitable for the service in which she is to be employed * * * and is in a condition to warrant the belief that she may be used in navigation with safety to life". Obviously, this discretion was lodged in the local inspectors in the first instance to provide the flexibility necessary in meeting particular situations and in assuring safety requirements suitable for particular types of barges. No one will suggest, for example, that a barge such as the "Olympic", anchored on the high seas and providing resort for pleasure fishermen in large numbers, would require the same safety precautions that a coal barge on the Great Lakes would. Just as the Lord High Executioner's purpose in "The Mikado" was to "make the punishment fit the crime", so the purpose of the statutes was to make the safety requirements fit the needs of particular situations.

Counsel for Hermosa argue (Hermosa's Opening Brief, p. 51), in disregard of the express provisions of 46 U.S. 391 and 395, that the local inspectors' duties are purely ministerial, that they have no discretion, because if they did have dis-

cretion, each of the 48 Boards of Local Inspectors might promulgate conflicting minimum requirements and a vessel which passed inspection in San Francisco "would be banned when she reached New York". This is ridiculous. An orderly system of appeal from decisions of the local inspectors is provided (46 U. S. C. 391, 431, et seq.), and no more confusion can result than results from diverse decisions of local United States District Courts, from which appeals may be taken and in connection with which appellate procedure provides for reconciliation of differences of local opinion. As a matter of fact, the appellate procedure provided was followed in the "Olympic's case, and the requirements of the local inspectors were confirmed (Hermosa's Opening Brief, p. 55).

It is suggested (Hermosa's Opening Brief, p. 52) that the local inspectors were wrong because Rule VI, subdivision 14 (46 C. F. R. 63.14) provides that the rules of the American Bureau of Shipping shall be the standard of inspection and because the American Bureau of Shipping required only one collision bulkhead not less than 5 feet aft of the stem at the loadline of a sailing vessel and the Bureau had no requirements or recommendations as to bulkheads for barges. This contention is adequately disposed of by the official action of the Bureau of Marine Inspection and Navigation, confirming the decision of the local inspectors which imposed the bulkhead requirements in question upon the "Olympic". Nevertheless, lest the Court consider there is substance in counsel's contentions, we will briefly discuss the American Bureau of Shipping's rules and regulations. In the first place, they have no application to vessels constructed of iron, of which the "Olympic" was made. The full title of the rules is: "American Bureau of Shipping Rules for the Classification and Construction of *Steel* Vessels," and they provide:

> "The Rules and Tables, except where otherwise specified, are intended for vessels to be constructed of mild *steel,* manufactured and having the physical properties as specified in Section 39. * * * Where it is intended to

use *iron,* steel or other material having physical properties differing from those specified in Section 39, the use of such material and the corresponding scantlings are to be specially considered."

American Bureau of Shipping Rules for the Classification and Construction of Steel Vessels, 1940, sec. 3, p. 5.

Obviously, the requirements for vessels to be constructed of steel under modern specifications of that material provide no standard whatsoever for an iron vessel built in 1877. Moreover, the classification rules do not provide an inflexible standard, even for steel vessels. In the section dealing with bulkhead requirements, the rules provide:

"All vessels of ordinary type and normal form should be provided with strength and watertight bulkheads in accordance with this section; in vessels of special type where adherence to those rules is found to be impracticable, the arrangements will require to be specially approved."

Ibid., sec. 12, p. 31.

Although there is special mention of screw vessels, sailing vessels, and vessels with machinery spaces, no mention is made of barges. Even if the "Olympic" were built of steel and within the subject matter covered by the classification rules, it would be subject to special consideration inasmuch as there is no specific mention of barges and the "Olympic" was not of "ordinary type and normal form". It was a vessel "of special type", once a sailing vessel but that no longer, in short, of the very amorphous nature for which the flexibility of the classification rules left provision.

Even as to steel vessels covered by the classification rules, counsel for the "Olympic" have misstated the bulkhead requirements. The rules provide generally:

"All vessels should have complete transverse bulkheads extending to the strength deck, spaced not over 100 feet apart. This should be accomplished by the fitting of sub-

stantial transverse 'tween deck bulkheads immediately over the main watertight bulkheads."

Ibid.

And the specific requirement of collision bulkheads in sailing vessels is not, as counsel assert, that such bulkhead be not less than 5 feet aft of the stem, but that it be not less than .05 of the vessel's length abaft the stem.

Ibid.

The statements that the decision of the inspectors was motivated by a desire to curb the operation of gambling ships (Hermosa's Opening Brief, p. 54) is purely speculative. The gambling vessels had all ceased operation before the local inspectors' letter of June 3, 1940, was sent to Captain Andersen. They had been swept out of operation by a decision of the California Supreme Court in November, 1939. Furthermore, the local inspectors' requirements were reasonably designed to promote the safety of life aboard the "Olympic" and the other fishing barges and upon the "Olympic's" own appeal were sustained by the Bureau of Marine Inspection and Navigation at Washington.

There is also the presumption that the inspectors acted rightly in the exercise of the discretion and authority lodged in them by statute and that their action was proper and lawful.

Butler v. Maples, 76 U. S. 766, 19 L. ed. 822.

"All reasonable presumptions must be indulged in support of the action of the officers to whom the law intrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law, or that misrepresentation and fraud were practised upon them, or that they themselves were chargeable with fraudulent practices, and that, as a result, the patent was issued to the defendant when it should have been issued to the plaintiff, their action must stand."

Ross v. Stewart, 227 U. S. 530, 535, 57 L. ed. 626, 629; 1 Jones, *Evidence* (4th ed.), secs. 41-42, 45.